Supreme Court, U. S.
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No. 78-459

In the Supreme Court of the United States

OCTOBER TERM, 1978

BERNHARD ROSEE,
Plaintiff-Petitioner,

vs.

BOARD OF TRADE OF THE CITY OF CHICAGO, an Illinois corporation, **SIDNEY C. HAMPER, MARTIN H. MILEK, ROY C. LOFTUS, RICHARD ROSE, RAYMOND COMENZO** and **THOMAS HERR,** individually and as members of the Committee of Arbitration of the Board of Trade of the City of Chicago; **JULIUS MAYER, WILBERT E. HUGE, ROBERT L. DAVID, THOMAS E. HOSTY, ROBERT C. LIEBENOW,** individually and as President of the Board of Trade of the City of Chicago; **WARREN W. LEBECK,** individually and as Secretary of the Board of Trade of the City of Chicago; **JAMES J. COUGHLIN; ALBERT W. KIBBY** and **SAM GORDON,** employees of the Commodity and Exchange Authorities of the U.S. Department of Agriculture,
Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS AND THE SUPREME COURT OF ILLINOIS

BERNHARD ROSEE, pro se
1220 N. State Parkway
Chicago, Illinois 60610

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

PAGE

Opinion below 2

Jurisdiction 2

Questions presented for review 2

Constitutional provision involved 3

Statement of the case 3

Board of Trade Rules 130, 140 and 141 9

Chapter 5 Offenses and Punishment 10

Reasons for Granting Writ 11

Argument 12

Conclusion 13

Appendi A—Opinion of the Appellate Court of Illinois ..... App. 1

Appendix B—Order denying Petition for Leave to Appeal on May 26, 1978 ..... App. 10

AUTHORITIES CITED

Cases

PAGE

Barrows v. Jackson, 346 U.S. 249 12

Board of Trade v. Johnson, 264 U.S. 1 12

Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 .....12, 13

Shelley v. Kraemer, 334 U.S. 1 12

Weaver v. Fisher, 110 Ill. 152 12

Other Authorities

28 U.S.C. 1343 12

42 U.S.C. 1983 12

Fourteenth Amendment to U. S. Constitution 11, 12

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, BERNHARD ROSEE, prays that a Writ of Certiorari issue to review a judgment of the Appellate Court of Illinois in this case.

OPINION BELOW

The Opinion of the Appellate Court of Illinois is reproduced in Appendix "A" infra. Leave to appeal the decision of the Appellate Court was denied by the Supreme Court of Illinois on May 26, 1978. Appendix "B".

JURISDICTION

The order of the Supreme Court of Illinois denying leave to appeal from the Appellate Court of Illinois was entered May 26, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Sec. 1254. Jurisdiction of this Court also attaches pursuant to the Constitution and laws of the United States, including the First Amendment, the Fifth Amendment and Fourteenth Amendment of the Constitution, the Judicial Code (28 U.S.C.A., Sec. 1346) and the Commodity Exchange Act (7 U.S.C.A., Sec. 1 to 17).

QUESTIONS PRESENTED FOR REVIEW

1. Did the trial and appellate courts of Illinois preclude Petitioner from fundamental procedural safeguards and rights violative of the Due Process Clause of the Fourteenth Amendment in dismissing Petitioner's request for a new trial based on newly discovered evidence?

2. Whether an alleged fraudulent trading account could be used against petitioner to expel him from trading on the Chicago Board of Trade and to stigmatize him against trading in any public commodity brokerage house?

3. Whether Chicago Board of Trade rules 130, 140 and 141 are consistent with the due process clause of the Fourteenth Amendment in empowering the Board of Trade to expel a member without proper documentation of charges against the member?

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment of the Constitution of the United States provides in pertinent part as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In 1963, petitioner commenced this action in the Circuit Court of Cook County, Illinois, against, *inter alia,* the Board of Trade of the City of Chicago (hereafter, "the Board" or "the Board of Trade"), various Board members (individually and as members of the Board's Committee of Arbitration), James E. Baggot, Jr., and Donald Morrison (individually and d/b/a Baggot and Morrison) and Harris Haywood, the managing employee of the firm of Baggot and Morrison. Petitioner, who had been a member of the Board of Trade from 1944 until the occurrence of the events which formed the basis for this action and who had traded through the firm of Baggot and Morrison from 1958 through part of the year 1960, sought damages for conspiracy, fraud, misrepresentation, defamation, malicious interference with occupation and breach of a fiduciary relationship. The case was ultimately tried in the Circuit Court of Cook County before Judge Nathan Cohen, sitting without a jury, and he entered judgment in favor of plaintiff and against the defendants, James E. Baggot, Jr. (hereafter "Baggot"), Donald W. Morrison (hereafter "Morrison"), and Harris Haywood (hereafter "Haywood"),

jointly and severally, in the sum of $399,139.42 in compensatory damages. He also awarded plaintiff exemplary damages of $150,000 against Morrison and $150,000 against Haywood. The remaining defendants, the Board of Trade of the City of Chicago, its officers and members of its Committee of Arbitration (hereafter referred to collectively as "The Board of Trade defendants") were dismissed at the conclusion of the plaintiff's case.

The defendants Baggot, Morrison and Haywood appealed from the said judgments against them, and plaintiff cross-appealed from the judgment in favor of the Board of Trade defendants.

The Appellate Court reversed the judgment in favor of plaintiff and remanded the cause to the trial court with directions to enter judgment in favor of the defendants Baggot, Morrison and Haywood. The Court also affirmed the judgment in favor of the Board of Trade defendants. The Supreme Court of Illinois subsequently denied petitioner leave to appeal.

While the aforementioned appeal was pending, petitioner initiated proceedings pursuant to Section 72 of the Civil Practice Act of Illinois [ch. 110, sec. 72, Ill. Rev. Stat.], a provision which affords a party relief from judgments after term time. The proceedings under Sec. 72 gave rise to the instant appeal which was an effort to vacate the order dismissing the Board of Trade defendants. In support of the Petition, appellant submitted newly discovered documentary evidence, not available to the plaintiff at the time of trial, and allegen that the newly discovered evidence supports plaintiff's original claim (a) that the conduct and outcome of the Board of Trade arbitration hearing was preordained, and was designed to protect defendants Baggot, Morrison and Haywood, and to conceal the fraud that had been perpetrated upon petitioner by them; (b) that the failure of the Board of Trade

properly to oversee the conduct of Baggot & Morrison, the Board having been placed on explicit notice of violations by that firm in the handling of customers' accounts, constituted deliberate malfeasance; and (c) that key members of the Board of Trade were active conspirators with other defendants in staging a sham arbitration hearing in order to oust Rosee from the Board of Trade and to permit Baggot & Morrison to illegally obtain and retain substantial sums of money owed to Rosee by said defendants.

On April and May 1977 the Chicago Board of Trade and the attorneys for Bagott & Morrison introduced before Judge Nathan M. Cohen a spurious trading card, Exhibit No. 14 to link Rosee to Account 35 which was certified by the Appellate Court. The defendant Board of Trade and Baggott & Morrison failed to produce evidence in writing as required under the Commodities & Exchange Act under §13 which provides criminal penalties for those violating Section 6b, including those who shall fail to evidence any contract by a record in writing.

Chicago Board of Trade v. *Olsen,* 262 U.S. at page 42.

Section 9 declares it to be a misdemeanor for a member of a designated board of trade to fail to evidence any contract mentioned in § 4 by a record in writing as therein required. This is only a legitimate means of enforcing the statutory regulations of the Board of Trade which we have found to be within the power of Congress.

This spurious trading card dated October 1, 1959 was sent through the mail and Rosee was posted in every State in the Union and all over the World for failure to perform and exchange contract. See Rule 130, 140, 141. This trading card was designed to link Rosee to Account #35

which Rosee is labeled a fraud and dishonorable person for the past 17 years, and Rosee was deprived of his livelihood and his membership was taken from him by fraud and conspiracy to make Rosee ineffective and to destroy his name and reputation because Rosee from time to time complained of irregularities being conducted in the Board of Trade and also attempted to expose the disappearance of our gold reserves also contacted a number of members of Congress in attempting to stop the unnecessary spending of taxpayers' money.

The Board of Trade violated its own rules, Rule 153, Section 7; Rule 185, Rule 186 and Rule 187.

a) Section 7 of the Legislative Act of Illinois creating the Board of Trade gave the chairman of the committee the right to issue subpoenas to compel the attendance of witnesses;

b) Rule 187 required that an award shall be rendered by the Arbitration Committee according to *the facts disclosed by evidence and the laws of the land;*

c) Rule 186 required the Arbitration Committee to hear *all evidence* relative to the controversy and gave the member resisting a claim the right to make any defense which would be available to him *in a court of law or equity;*

d) Rule 185 required committee members to take an oath to *faithfully and fairly* hear and examine the controversy according to principles of *equity and justice,* and to make *just and true* awards;

e) Rule 160 provided that no member has a right to be represented by professional counsel.

13. The Board of Trade violated and failed to enforce its own rules by denying Bernhard Rosee due process of law.

The Board of Trade also violated Section 4b (A), (B), (C), Section 5a, Section 5b and Section 6b of the Commodity Exchange Act. The Appellate Court and the Supreme Court of the State of Illinois is in conflict with their ruling in denying Rosee evidence in writing as required by this Court.

SEC. 4b. It shall be unlawful for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of (1) any contract of sale of any commodity in interstate commerce, or (2) any contract of sale of any commodity for future delivery made, or to be made, on or subject to the rules of any contract market for or on behalf of any person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(A) to cheat or defraud or attempt to cheat or defraud such person;

(B) willfully to make or cause to be made to such person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

(C) willfully to deceive or attempt to deceive such person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person.

SEC. 5b. The failure or refusal of any board of trade to comply with any of the provisions of this Act, or any of the rules and regulations of the Secretary of

Agriculture thereunder, shall be cause for suspending for a period not to exceed six months or revoking the designation of such board of trade as a "contract market" in accordance with the procedure and subject to the judicial review provided in paragraph (a) of section 6 of this Act.

SEC. 6b. If any board of trade, or any director, officer, agent, or employee of any board of trade is violating or has violated any of the provisions of this Act or any of the rules or regulations of the Secretary of Agriculture thereunder, or any order issued by the commission pursuant to any provision of this Act, the commission, in lieu of revoking the designation of such board of trade as a "contract market" may, upon notice and hearing and subject to appeal as in other cases provided for in paragraph (a) of section 6 of this Act, make and enter an order directing that such board of trade, director, officer, agent, or employee shall cease and desist from such violation or violations, and if such board of trade, director, officer, agent, or employee, thereafter and after the lapse of the period allowed for appeal of such order or after the affirmance of such order, shall fail or refuse to obey or comply with such order, such board of trade, director, officer, agent, or employee shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $500 nor more than $10,000 or imprisoned for not less than six months nor more than one year, or both. Each day during which such failure or refusal to obey such order continues shall be deemed a separate offense.

SEC. 9. Any person who shall violate the provisions of section 4, section 4a, section 4b, section 4c, section 4d, section 4e, section 4h, or section 4i of this Act, or who shall manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any board of trade, or who shall corner or attempt to corner any such commodity, or who shall fail to evidence any contract mentioned in section 4 of this Act by a record in writing as therein required, or who shall knowingly or carelessly deliver or cause to be delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution.

BOARD OF TRADE RULES 130, 140 and 141

130. Suspension for Default.

Where a member fails or refuses to perform an exchange contract with or pay obligations arising out of such contracts to another member, the defaulting member, on complaint of the other member, shall be suspended until the contract is performed or the debt satisfied. Registered firms and corporations shall be deemed members under this rule. If the member alleged to be in default denies the default, he shall be entitled to have the claim arbitrated. If the claim is admitted or established by a final arbitration award, the defaulting member shall be suspended until he has satisfied and discharged all debts owing to members on exchange contracts. Application for reinstatement shall allege, under oath, that all such debts have been discharged, and notice of such application shall be posted on the bulletin board fifteen days prior to the hearing of such application.

CHAPTER 5 OFFENSES AND PUNISHMENT

140. Expulsion and Suspension from Membership.

Unless otherwise specifically provided, the penalty of suspension from membership may be inflicted, and the period of suspension determined, by the vote of a majority of the members of the board present, and the penalty of expulsion from membership or of ineligibility of a suspended member for reinstatement may be inflicted by a vote of two-thirds of the members of the board present.

141. Inequitable Proceedings.

A member who shall have been adjudged by a majority vote of the members of the board present guilty of a violation of any rule or regulation of the association or any by-law or resolution of the clearing house, regulating the conduct or business of member, or guilty of violating any agreement made with the association, or guilty of fraud, dishonorable or dishonest conduct, or of conduct or proceedings inconsistent with just and equitable principles of trade, or be guilty of making default on contracts for future delivery (unless the board shall determine that such default was unintentional), may be suspended or expelled as the board may determine, unless the offense is the violation of a regulation or rule for which a difference penalty has been provided, in which case the other penalty may be imposed.

REASONS FOR GRANTING WRIT

1. The Illinois Appellate Court's decision denied petitioner due process of law in dismissing his request for a new trial based on newly discovered evidence which conclusively would have established that the trading account attributed to petitioner was spurious and did not belong to him.

2. The newly discovered evidence established conclusively that petitioner was defrauded, the denial of his petition for a new hearing deprived him of his right to be exonerated and to have his right to earn a living reestablished.

3. **Rules 130, 140 and 141 empowering the Board of Trade to arbitrarily expel a member, which expulsion operates as a lifelong stigma barring an expelled member from pursuing his trade and calling as a commodity trader, is a palpable violation of due process of the Fourteenth Amendment.**

ARGUMENT

The right to a hearing is protected by the guarantees of the Fourteenth Amendment and is the most precious liberty that a man in modern society can possess. There is no question that a man's right to work and to earn a livelihood is of equal importance to his right to liberty and freedom to own property.

Petitioner's fundamental rights have been denied by the alleged fraud and arbitrariness committed by respondents and his sole means of support has been taken from him without due process.

It was held by this Court that membership in a Board of Trade is property. *Board of Trade* v. *Johnson,* 264 U.S. 1. Illinois similarly recognizes such property rights. *Weaver* v. *Fisher,* 110 Ill. 152, 153.

The right to earn a living is also protected by the Civil Rights Statute where that right is taken under the color of State action. 28 U.S.C. 1343, 42 U.S.C. 1983.

It has been the constant ruling of the United States Supreme Court that the action of the State to which the Fourteenth Amendment has reference, includes action of the State courts and State judicial officials. The federal guaranty of Due Process extends to State action through its judicial as well as through its legislative, executive or administrative branches. *Brinkerhoff-Faris Co.* v. *Hill,* 281 U.S. 673, 680; *Shelley* v. *Kraemer,* 334 U.S. 1, 14, 15, 17, 18; *Barrows* v. *Jackson,* 346 U.S. 249, 254.

In the *Brinkerhoff-Faris Co.* case, p. 682, the Court said:

> "Whether acting through its judiciary or through its legislative, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

CONCLUSION

For the reasons above stated it is respectfully prayed that a Writ of Certiorari issue to the Supreme and Appellate Courts of Illinois and that the case should be reviewed in full by this Honorable Court.

Respectfully submitted,

BERNHARD ROSEE,
Pro Se

APPENDIX

APPENDIX A

FIRST DIVISION
JANUARY 23, 1978

76-506

BERNHARD ROSEE,

Petitioner-Appellant,

vs.

BOARD OF TRADE OF THE CITY OF CHICAGO, an Illinois corporation, SIDNEY C. HAMPER, MARTIN H. MILEK, ROY C. LOFTUS, RICHARD ROSE, RAYMOND COMENZO, and THOMAS HERR, individually and as members of the Committee of Arbitration of the Board of Trade of the City of Chicago; JULIUS MAYER, WILBERT E. HUGE, ROBERT L. DAVID, THOMAS E. HOSTY, ROBERT C. LIEBENOW, individually and as President of the Board of Trade of the City of Chicago; WARREN W. LEBECK, individually and as Secretary of the Board of Trade of the City of Chicago; JAMES J. COUGHLIN; ALBERT W. KIRBY, and SAM GORDON,

Respondents-Appellees.

Appeal from the Circuit Court of Cook County
HON. NATHAN M. COHEN, *Judge Presiding.*

MR. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

Bernhard Rosee (petitioner) filed a petition pursuant to Ill. Rev. Stat. 1975, ch. 110, par. 72. The Board of Trade of the City of Chicago and various officers and members thereof (respondents) filed a motion to strike and dismiss on which the court reversed its ruling. Following evidentiary hearings, the petition was denied with prejudice. Petitioner has appealed.

In this court, petitioner urges that the trial court erred because newly discovered evidence, if known to the trial court in the prior proceedings, would have precluded dismissal for failure to establish a *prima facie* case. Respondents contend that petitioner failed to demonstrate an abuse of discretion by the trial court; the petition on its face shows that petitioner is not entitled to relief and, during the evidentiary hearings, no facts were proved which would support the granting of relief under Section 72.

The petition, filed on July 10, 1975, sought to vacate a judgment dismissing respondents as defendants in a civil action brought by petitioner against respondents and other defendants. This final judgment was entered on August 17, 1972. Our decision on direct appeal of that judgment by petitioner is reported as *Rosee* v. *Board of Trade* (1976), 43 Ill. App. 3d 203, 356 N.E.2d 1012, *leave to appeal denied*, 65, Ill. 2d 580, *cert. denied*, ... U.S. ....., ... L.Ed. 2d ....., 98 S.Ct. 127. In seeking section 72 relief, petitioner alleged the existence of "newly discovered documentary evidence which was not available to plaintiff at the time of trial, and which, if known to the court at trial, may have resulted in a judgment against the Board of Trade defendants * * *." Six letters, part of the so-called newly discovered evidence, were found on October 17, 1974 when petitioner and his attorney requested production of records at the Chicago office of the Commodity Exchange Authority (CEA). The petition further alleged the general counsel of the United States Department of Agriculture had directed the local CEA office to produce for petitioner's examination "all trading records pertaining to plaintiff's controversy with the brokers and the Chicago Board of Trade * * *." Petitioner alleged that these letters had not been brought immediately to the court's attention because petitioner "deemed it necessary to conduct further investigation into the leads suggested by the correspondence * * *." The petition also stated that due diligence had been exercised in seeking the " 'back-up' * * *" evidence and that these documents were then the subject of proceedings before the CEA.

An additional item of "newly discovered evidence * * *" was an alleged letter dated September 1, 1937. The only allegation as to the acquisition of this letter was that petitioner had discovered it "[s]ubsequent to the trial * * *."

In further support of the petition, the following documents were attached; an affidavit dated August 29, 1973 executed by an attorney, a photocopy of a transcript of testimony purportedly presented in a proceeding in the United States District Court on October 17, 1973, a group exhibit comprised of accounting records purporting to be a summary of petitioner's ledger account prepared in connection with a complaint before the CEA and a photocopy of an accounting ledger sheet allegedly found on June 1, 1975 among the papers of petitioner's former attorney who had died in the fall of 1974.

Respondents filed a motion to strike and dismiss the petition. Petitioner filed a response to the motion and filed an additional affidavit in support of the petition. The affidavit contained petitioner's affirmation that, prior to the judgment of August 17, 1972, petitioner had exercised due diligence to obtain records showing the "original daily computation of customer segregated funds * * * and any other records which would establish the true status of petitioner's trading accounts." The affidavit further alleged, "[t]hat access to this major and newly discovered evidence was fraudulently withheld from * * * [petitioner] until October 18, 1974, and that this * * * evidence was first released on that date."

Having reserved ruling on the motion to dismiss, the trial court permitted petitioner to examine witnesses and offer documentary evidence in hearings conducted on 12 dates between September 17 and December 23, 1975. Petitioner's documentary evidence was admitted subject to respondents' continuing objections on the grounds, *inter alia,* of relevance and materiality. On February 4, 1976, petitioner rested his case. Respondents moved for judgment under Ill. Rev. Stat. 1975, ch. 110, par. 64(3). Following the filing of memoranda by the parties, on March 4, 1976, the trial court entered an order finding that petitioner had not proved a *prima facie* case, denying the petition with prejudice and entering judgment in respondents' favor. The order also found that respondents' motion to strike and dismiss and respondents' standing evidentiary objections were mooted by the denial of the petition on the merits.

To obtain relief under section 72, (Ill. Rev. Stat. 1975, ch. 110, par. 72), petitioner was required to show that " 'through no fault or negligence of his own, the error of fact * * * was not made to appear to the trial court.' " (*Brunswick* v. *Mandel* (1974), 59 Ill. 2d 502, 504, 322 N.E.2d 25, quoting *Brockmeyer* v. *Duncan* (1960), 18 Ill. 2d 502, 505, 165 N.E.2d 294.) The burden was on petitioner "to allege and prove the facts justifying relief." (*Esczuk* v. *Chicago Transit Auth.* (1968), 39 Ill. 2d 464, 467, 236 N.E.2d 719.) Pertinent to this appeal, the limitation period of section 72(3), (Ill. Rev. Stat. 1975, ch. 110, par. 72(3)), provides: "The petition must be filed not later than 2 years after the entry of the order or judgment. Time during which * * * the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years." To avoid the bar of the limitation period, the pleadings must allege fraudulent concealment of the ground

for section 72 relief. See *e.g., People* v. *Colletti* (1971), 48 Ill. 2d 135, 138, 268 N.E.2d 397.

The petition here was filed July 10, 1975. The judgment order dismissing petitioner's suit against these respondents was entered on January 12, 1972. In that order the trial court found "that after 30 days from this date there will exist no just reason for delay of enforcement of or appeal from this order." On February 9, 1972, the trial court entered an order denying plaintiff's motion to vacate the order of January 12, 1972. This later order contained similar language concerning the availability of appeal to plaintiff. See Ill. Rev. Stat. 1975, ch. 110A, par. 304(a).

Since the instant petition was filed more than two years after the judgment order in question, the remaining issue is whether petitioner has demonstrated that the newly discovered evidence was fraudulently concealed from him until its discovery in October 1974 so as to toll the running of the limitation period.

On its face, the petition contains no allegation that this documentary evidence was in any way concealed from petitioner by respondents or anyone connected with or controlled by respondents. Petitioner's affidavit contains the conclusory statement that the "newly discovered evidence was fradulently withheld * * * from him. The affidavit fails to support this charge with underlying facts. In our opinion, the petitioner's failure to allege fraudulent concealment in the petition is not overcome by such nonspecific statements in the affidavit. General allegations of fraudulent concealment will not remove the limitation bar of section 72(3); specific allegations of "inculpatory facts * * *' " must be raised. *Masters* v. *Executor* (1970), 124 Ill. App. 2d 474, 477, 259 N.E.2d 399, *cert. denied,* 401 U.S.

969, quoting *Nogle* v. *Nogle* (1964), 53 Ill. App. 2d 457, 466, 202 N.E.2d 683.

In addition, petitioner's response to the motion to strike and dismiss fails to demonstrate the manner in which the new evidence was fraudulently concealed. The response states that the newly discovered evidence was "only released to petitioner Rosee because of an affirmative complaint by [a United States Senator to the United States Secretary of Agriculture]." The correspondence relied on in the petition was allegedly made available only because of this "senatorial intervention * * *." Overlooking petitioner's failure to implicate respondents in petitioner's difficulty in discovering these documents in Federal government files, these facts show neither fraud nor concealment. Further, on examination of the entire transcript of proceedings in this case, we find no testimony or documentary evidence which proves directly or by remote inference that the documents relied on to support the petition were in any fashion concealed from petitioner by the fraud of any person or agency.

In view of petitioner's failure to plead or prove fraudulent concealment of the ground for relief, we conclude that his claim for relief was barred by the limitation period of section 72. Ill. Rev. Stat. 1975, ch. 110, par. 72(3); *Colletti,* 48 Ill. 2d 135, 137-38; see *Agorianitis* v. *Ress* (Docket No. 76-1252, November 16, 1977), slip op. at 3, ... Ill. App. 3d ....., ..., ... N.E.2d ..... and cases there cited; *Masters,* 124 Ill. App. 2d 474, 477.

We will also point out that both the allegations of the petition and the evidence heard by the trial court in support thereof completely fail to show that petitioner acted with diligence in filing this petition. As above shown, the

judgment order dismissing the Board of Trade defendants (respondents) was entered January 12, 1972 and the order dismissing petitioner's suit against the remaining defendants was entered on August 17, 1972. Petitioner alleged that he found the so-called newly discovered evidence on October 17, 1974. The petition under section 72 was not filed until July 10, 1975, only a few days short of 9 months after this alleged discovery.

The courts of Illinois have repeatedly held that eligibility for relief under section 72 rests solidly upon the requirement that petitioner act with due diligence so that his failure to avail himself of the remedy resulted from no fault or negligence of his own. This requirement is well illustrated by *Diacou* v. *Palos State Bank* (1976), 65 Ill. 2d 304, 357 N.E.2d 518 and the authorities there cited. There, plaintiff's case was dismissed for want of prosecution on May 18, 1972, and the petition to vacate that order was not filed by plaintiff until May 9, 1973, a lapse of almost 1 year. The supreme court denied section 72 relief because of lack of diligence.

Thus, quite apart from the bar of the limitation period expressed in section 72, (Ill. Rev. Stat. 1975, ch. 110, par. 73(2)), the failure of petitioner to act with due diligence which appears amply from the face of the petition itself and from the evidence operates as a complete demonstration of the legal validity and propriety of the order appealed from.

On September 17, 1975, before passing upon the motion of respondents to dismiss the petition, the court permitted petitioner to proceed with evidence in support of the petition. This was done by the court after petitioner suggested that his witnesses were ready and that he should be permitted to produce evidence. Hearing continued on

various dates until December 23, 1975. These hearings comprise more than 700 pages of the report of proceedings. By February 4, 1976, the taking of evidence was completed. The court entered an order granting petitioner leave to file his Exhibits 1 through 44.

Shortly thereafter respondents filed a written motion for judgment in their favor. (Ill. Rev. Stat. 1975, ch. 110, par. 64(3).) As we have stated, on March 4, 1976, the court entered an order dismissing the petition. The order found that petitioner had failed to adduce evidence containing "a scintilla of credible or competent evidence * * *" that the respondents conspired or acted in concert to defraud petitioner or to do him any wrong. The order found that having ruled on the petition on its merits, the motion of respondents to strike and dismiss was thereby mooted. However, in any event, as above shown, analysis of the petition and the motion to dismiss impels the conclusion that the hearing of evidence was unnecessary because the petition was legally defective from several points of view.

On the merits of the evidence received, reading of the amended brief filed by petitioner, *pro se,* shows no reference to any portion of the voluminous record containing any credible or competent evidence such as would be sufficient for the entry of an order under section 72. Petitioner's amended brief contains a statement of fact covering some 15 pages. This statement does not present a summary of the evidence and makes but four references to the transcript of hearings on the section 72 petition. These references pertain entirely to the dealings and relationship between petitioner and the brokerage firm with which he dealt; a situation fully considered and litigated in our

previous opinion regarding the rights of petitioner and the brokerage firm. (See *Rosee* v. *Board of Trade,* 43 Ill. App. 3d 203.) We have examined the transcript and the various exhibits submitted by petitioner. We are in complete accord with the result reached by the trial court that petitioner has failed to introduce any credible or competent evidence to support his theories under section 72.

Respondents have moved this court to impose sanctions upon petitioner under section 41 of the Civil Practice Act. Upon consideration of said motion it is denied.

The judgment appealed from is affirmed.

Judgment affirmed.

McGLOON and LORENZ, JJ., concur.

APPENDIX B

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

May 26, 1978

Mr. Bernhard Rosee
1220 North State Parkway
Chicago, IL 60610

No. 50554 - Bernhard Rosee, petitioner vs. Board of Trade of the City of Chicago, an Illinois corporation, et al., etc., et al., respondents. Leave to Appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

Supreme Court, U. S.
FILED
OCT 19 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-459

BERNHARD ROSEE,

Petitioner,

vs.

BOARD OF TRADE OF THE CITY OF CHICAGO, AN ILLINOIS CORPORATION, SIDNEY C. HAMPER, MARTIN H. MILEK, ROY C. LOFTUS, RICHARD ROSE, RAYMOND COMENZO, AND THOMAS HERR, INDIVIDUALLY AND AS MEMBERS OF THE COMMITTEE OF ARBITRATION OF THE BOARD OF TRADE OF THE CITY OF CHICAGO; JULIUS MAYER, WILBERT E. HUGE, ROBERT L. DAVID, THOMAS E. HOSTY, ROBERT C. LIEBENOW, INDIVIDUALLY AND AS PRESIDENT OF THE BOARD OF TRADE OF THE CITY OF CHICAGO; WARREN W. LEBECK, INDIVIDUALLY AND AS SECRETARY OF THE BOARD OF TRADE OF THE CITY OF CHICAGO; JAMES J. COUGHLIN; ALBERT W. KIBBY AND SAM GORDON,

Respondents.

BRIEF OF BOARD OF TRADE RESPONDENTS* IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

JOHN E. ANGLE
JOHN H. STASSEN
Attorneys for Board of Trade Respondents

* Board of Trade of the City of Chicago; Sidney C. Hamper, Martin H. Milek (Deceased), Roy C. Loftus, Richard Rose, Raymond Comenzo, and Thomas Herr, individually and as members of the Committee of Arbitration of the Board of Trade of the City of Chicago; Julius Mayer, Wilbert E. Huge (Deceased); Robert L. David; Thomas E. Hosty (Deceased); Robert C. Liebenow, individually and as President of the Board of Trade of the City of Chicago; Warren W. Lebeck, individually and as Secretary of the Board of Trade of the City of Chicago; and James J. Coughlin.

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INDEX

PAGE

Statement 1

TABLE OF AUTHORITIES

Case & Co., Inc. v. Board of Trade of the City of Chicago, 523 F. 2d 555 (7th Cir. 1975) 4

Lagorio v. Board of Trade of the City of Chicago, 529 F. 2d 1290 (7th Cir. 1976), *cert. denied*, 426 U. S. 950 (1976) 4

Rosee v. Board of Trade of the City of Chicago, 311 F. 2d 524 (7th Cir. 1963), *cert. denied*, 374 U. S. 806 (1963) 2, 5

Rosee v. Board of Trade of the City of Chicago, No. 63 C 1348 (N. D. Ill. 1966), *aff'd*, U. S. Ct. of Appeals (7th Cir.), Nos. 15886 & 16373, *cert. denied*, 393 U. S. 1055 (1969), *rehearing denied*, 393 U. S. 1124 (1969) 2

Rosee v. Board of Trade of the City of Chicago, 43 Ill. App. 3d 203, 356 N. E. 2d 1012 (1st Dist. 1976), *appeal denied*, 65 Ill. 2d 580 (1977), *cert. denied*, 434 U. S. 837 (1977); 57 Ill. App. 3d 228 (1st Dist. 1978), *appeal denied*, ... Ill. 2d ..... (1978), petition for cert. filed (No. 78-459) 2, 3

Rosee v. Bergland, Civil No. 76-1721, U. S. Dis. Ct. (D. C.), dismissed April 26, 1977 (appeal dismissed) .. 2

Ryan v. Cudahy, 157 Ill. 108 (1895) 4

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STATEMENT

This case arose from what was essentially a simple accounting dispute between a professional commodity trader (Bernhard Rosee) and his brokerage firm (Baggot & Morrison) which Rosee has attempted over the years to transform into a *cause celebre*. The dispute arose some 19 years ago when Rosee and Donald Morrison, through arbitration at the Chicago Board of Trade, sought to resolve questions concerning a trading debit.

Despite the dramatics which Rosee has employed, this action is at heart a routine controversy over whether a debt exists.

Notwithstanding this case's basically mundane nature, it has, in the course of 18 years and in various trappings, been before the Superior and Circuit Courts of Cook County, Illinois, the United States District Court for the Northern District of Illinois (twice), the United States Court of Appeals for the Seventh Circuit (twice), the Appellate Court of Illinois (twice), the Illinois Supreme Court (twice), and on three occasions, this Court (on petitions for *certiorari*, all of which were denied).[1]

It is now before this Court a fourth time. We respectfully submit that this latest petition for writ of *certiorari* is without merit and should be denied, as were Rosee's previous petitions to this Court.

This fourth petition for *certiorari* specifically concerns a post-judgment proceeding instituted by Rosee under Section 72 of the Illinois Civil Practice Act (Ill. Rev. Stat., ch. 110, § 72)[2]

1. See, *e.g.*, *Rosee* v. *Board of Trade of the City of Chicago*, 311 F. 2d 524 (7th Cir. 1963), *cert. denied*, 374 U. S. 806 (1963); *Rosee* v. *Board of Trade of the City of Chicago*, No. 63 C 1348 (N. D. Ill. 1966), *aff'd*, U. S. Ct. of Appeals (7th Cir.) Nos. 15886 and 16373, *cert. denied*, 393 U. S. 1055 (1969), *rehearing denied*, 393 U. S. 1124 (1969); *Rosee* v. *Board of Trade of the City of Chicago*, 43 Ill. App. 3d 203, 356 N. E. 2d 1012 (1st Dist. 1976), *appeal denied*, 65 Ill. 2d 580 (1977), *cert. denied*, 434 U. S. 837 (1977); 57 Ill. App. 3d 228 (1st Dis. 1978), *appeal denied*, . . . Ill. 2d . . . .(1978), *petition for cert. filed* (No. 78-459). In addition, the matter has been reviewed by both the Commodity Exchange Commission and its successor, the Commodity Futures Trading Commission. See CCH *Comm. Futures L. Rep.*, ¶ 20,140 (Transfer Binder). A further extension of this cause, a 1976 suit brought by Rosee in the United States District Court for the District of Columbia, was dismissed on April 26, 1977 on grounds of *res judicata* and collateral estoppel, the Court concluding, *inter alia*, that "Mr. Rosee has had his day in Court." Memo. Order, p. 5, *Rosee* v. *Bergland*, Civil No. 76-1721 (appeal dismissed). Indeed, Rosee has had 18 years in every conceivable court and before every conceivable administrative agency.

2. Section 72 of the Illinois Civil Practice Act provides in pertinent part:

(Footnote continued on next page.)

seeking to vacate, on the basis of so-called "newly discovered evidence," the judgment orders entered in January of 1972 against Rosee and in favor of the Board of Trade Respondents.[3] Rosee's petition for relief under Section 72 was denied on the merits by the Circuit Court of Cook County on March 4, 1976, after 14 evidentiary and related hearings. Rosee then appealed, urging that the trial court be reversed and that a new trial against the Board of Trade Respondents be ordered.

Following briefing and oral argument, the Illinois Appellate Court ruled that Rosee's petition under Section 72 of the Illinois Civil Practice Act was legally defective in that it (a) was barred by the statute's 2 year limitation period (having been filed 2 years and 10 months after trial, and there being no pleading or proof of fraudulent concealment) and, (b) Rosee had failed to show due diligence in bringing his petition, as required by Illinois law. [Rosee App. A, p. 7] Additionally, the Appellate Court, upon a review of the evidentiary record, agreed with trial court's ruling on the merits that Rosee had failed to introduce any credible or competent evidence to support his theories under Section 72. [Rosee App. A., pp. 8 & 9]. Subsequently, the Illinois Supreme Court denied leave to appeal.[4]

(Footnote continued from preceding page.)

> (1) Relief from final orders and judgments, after 30 days from the entry thereof may be had upon petition as provided in this section. . . .
>
> * * *
>
> (3) The petition must be filed not later than 2 years after the entry of the order or judgment. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years.
>
> * * *

3. *Affirmed*, 43 Ill. App. 3d 303 356 N. E. 2d 1012 (1st Dist. 1976), *appeal denied*, 65 Ill. 2d 580 (1977), *cert. denied*, 434 U. S. 837 (1977).

4. It should be noted that Rosee states in his petition for *certiorari* (page 2) that the "jurisdiction of this Court is invoked pursuant to 28 U. S. C. Sec. 1254." Section 1254 is inapplicable, however. It relates solely to review of cases in the Federal courts of

(Footnote continued on next page.)

Shorn of his numerous misstatements and inflammatory rhetoric,[5] the question which Rosee presents to this Court for review is simply whether the Appellate Court of Illinois and the Illinois Supreme Court were *wrong* in exercising (or declining to exercise) their constitutional and statutory review powers in a manner unsatisfactory to Rosee. Manifestly, this does not raise a question under the Fourteenth Amendment.[6]

(Footnote continued from preceding page.)

appeals. [Rosee's other jurisdictional citations are also inapposite.] We must assume that Rosee intended to invoke section 1257 of Title 28 ("State courts; appeal; *certiorari*"), which provides for review by writ of *certiorari* of "final judgments or decrees rendered by the highest court of a State in which a decision could be had" where, *inter alia*, "any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." Yet Rosee, on page 1 of his petition, prays for review of the judgment of the Appellate Court of Illinois, and not the order of the Illinois Supreme Court denying his petition for review by that court. Nor did Rosee, in either his appeal to the Illinois Appellate Court or in his petition for leave to appeal to the Illinois Supreme Court, assert or claim any right or privilege under the Constitution or statutes or the United States.

5. Throughout his petition for *certiorari*, Rosee assumes as fact many of the very matters that have been decided against him, time and time again. [See particularly pages 6, 11, and 12.] Rosee also devotes a substantial portion of his petition to matters wholly outside of the record. The so-called "spurious trading card" referred to on page 5 (see also pages 7-9 and 11) was the subject of separate proceedings in the Circuit Court of Cook County instituted by Rosee *after* the March 4, 1976 order denying Rosee's Section 72 petition. These separate proceedings were concluded on April 21, 1978, with the Court once again ruling against Rosee *on the merits*. No appeal was taken, and the time for such an appeal has long since expired. See Ill. S. Ct. Rule 303(a).

6. Rosee may be attempting to once again create the false impression that the Chicago Board of Trade can do anything it desires and be immune from judicial inquiry. (See Rosee Pet., pp. 12 and 13.) This is a gross perversion of what the law provides. See, *e.g.*, *Ryan* v. *Cudahy*, 157 Ill. 108, 122-24 (1895); *Case & Co., Inc.* v. *Board of Trade of the City of Chicago*, 523 F. 2d 555 (7th Cir. 1975); *Lagorio* v. *Board of Trade of the City of Chicago*, 529 F. 2d 1290 (7th Cir. 1976), *cert. denied*, 426 U. S. 950 (1976). A similar argument was advanced by Rosee in the predecessor to this case and was rejected by the United States Court of Appeals for the Seventh

(Footnote continued on next page.)

Rosee's petition for *certiorari* is but a rambling and tired rehash of allegations and theories which have been consistently rejected by the courts.[7] Rosee has shown no special and important reasons whatsoever as to why a writ of *certiorari* should issue.[8] This petition, like his previous petitions, is wholly without merit. Acordingly, the Board of Trade Respondents respectfully urge that Rosee's Petition for writ of *certiorari* be denied.

Respectfully submitted,

JOHN E. ANGLE
JOHN H. STASSEN
Attorneys for Board of Trade Respondents

Of Counsel:
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

(Footnote continued from preceding page.)

Circuit. *Rosee*, 311 F. 2d 527-28, *cert. denied*, 374 U. S. 806 (1963). It should also be noted that Rosee is not challenging the constitutionality of Section 72 of the Illinois Civil Practice Act.

7. See note 1, *supra*.

8. Rosee's petition for *certiorari* does not come within gunshot of satisfying the criteria set forth in Supreme Court Rule 19. Most particularly, there is no showing that either the Illinois Supreme Court or the Illinois Appellate Court "has decided a federal question of substance" not heretofore determined by this Court, or has decided it in a way "probably not in accord" with applicable decisions of this Court. The decision below related solely to the application of Illinois law and involved no federal question whatsoever. See Rosee App. A.

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Plaintiff-Petitioner,

vs.

BOARD OF TRADE OF THE CITY OF CHICAGO, et al.,

Defendants-Respondents.

REPLY OF PETITIONER

BERNHARD ROSEE, pro se
1220 N. State Parkway
Chicago, Illinois 60610

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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REPLY OF PETITIONER

The Board of Trade has misrepresented the facts and the law. The most important misrepresentations are as follows:

1. The "spurious trading card," referred to in footnote 5 of the Respondent Board of Trade's opposition, was introduced by Mr. Angle, attorney for the Board of Trade, in April-May of 1977, (see Rosee's Petition, page 5) and was argued before the Illinois Appellate Court on November 21, 1977. The Illinois Appellate Court refused to consider it. Furthermore, this same matter was submitted to the Illinois Supreme Court on May 4, 1978 and that Court denied Petitioner Leave to Appeal.

2. The impression that the Chicago Board of Trade "can do anything it desires" (see Respondent footnote 6) is manifested by what they have done to Petitioner for the

past 18 years. The law, as quoted by Mr. Angle, does not provide what he alleges it provides.

Ryan v. *Cudahy,* 157 Ill. 108, 122-24 (1895) only involved a controversy concerning "margin", which has no bearing on Petitioner's case.

3. The reference by Respondent Board of Trade (page 2, footnote 1) to *Rosee* v. *Board of Trade of the City of Chicago,* No. 63 C 1348, is misleading in that it is still pending on newly discovered evidence before Honorable Judge Will.

On December 16, 1977, Honorable Judge Will stated as follows:

> "THE COURT: The Account 35 entries. It appears now, I think that Account 35 was a fictional account." (Rept. of Proceedings, p. 35).
>
> "THE COURT: There wasn't any customer whose account, Account 35 really was." (*Id.,* p. 36).
>
> "THE COURT: No, as a matter of fact I have seen enough documents to satisfy me of two things. One, that the books of Baggot and Morrison were inaccurate, and two, that Account 35 was not yours." (*Id.,* pp. 65-66).
>
> "THE COURT: I am subsequently satisfied Account 35 was not yours." (*Id.,* p. 71).

As to the Commodity Exchange Commission and its successor, Commodity Futures Trading Commission, these agencies failed and refused to produce for Petitioner, Docket 93, which would have exposed the fraud against Petitioner many years ago.

On October 17, 1963, the Honorable Judge Hubert Will issued a subpoena duces tecum on the Commodity Exchange Authority, Department of Agriculture, to produce

among other documents, the documents contained in Docket No. 93. Up to this date, none of these agencies have produced the documents in Docket No. 93.

On June 24, 1976, Judge Hubert Will entered an order as follows:

> "This Court finds that the Rosee deficits referred to in this Court's opinion were contained in a document tendered to this Court by the government which this Court is now satisfied and finds to be false and fraudulent. The Rosee deficit figures included in this Court's opinion were based on the false and fraudulent document in question which showed those deficits."

4. *Rosee* v. *Berglund,* Civil No. 76-1721 (U.S. Court of Appeals for the District of Columbia) was dismissed *without prejudice* at the request of Petitioner because of the similarity in the above matter before Judge Will.

As to the Statement on page 1 of Respondent's Brief that this case is a simple accounting dispute, this is erroneous.

CONCLUSION

By reason of the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BERNHARD ROSEE, PRO SE
1220 N. State Parkway
Chicago, IL 60610